

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7013

To be argued by
DAVID M. OLASOV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BROWNING DEBENTURE HOLDERS' COMMITTEE,
on behalf of itself, of its Members
and of all other Holders of 6% Convertible
Subordinated Debentures Due July 1, 1987
of Dasa Corporation, etc.; SIMMS C.
BROWNING, etc.; and ROY E. BREWER, etc.,

Plaintiffs-Appellants,

vs.

DASA CORPORATION, et al.; ARTHUR
ANDERSEN & CO., etc.; and THE BANK OF
NEW YORK, Trustee under the Indenture
dated as of July 1, 1967 between The
Bank of New York and Dasa Corporation,
etc.,

Defendants-Appellees.

ON APPEAL FROM JUDGMENTS OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE
THE BANK OF NEW YORK

SULLIVAN & CROMWELL
Attorneys for Defendant-Appellee
The Bank of New York
48 Wall Street
New York, New York 10005

EDWARD W. KEANE,
DAVID M. OLASOV,
Of Counsel.

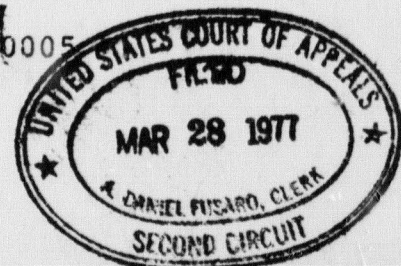


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	9
I. The District Court Had The Discretion By Statute And Contract To Require Plaintiffs To File An Undertaking To Secure The Payment Of The Bank's Attorneys Fees And Expenses And To Award An Allowance Of A Portion Of Such Fees To The Bank Against The Plaintiffs	9
II. The District Court Did Not Abuse Its Discretion By Requiring Such An Undertaking And By Awarding \$7,000 In Attorneys' Fees to The Bank	13
III. The Other Errors Assigned By Plaintiffs Are Irrelevant To The Propriety Of The Judgment In The Bank's Favor	14
CONCLUSION	15

Appendix A

Opinion of District Court (Owen, J.)
Filed April 21, 1975 And Amendment
Thereto Filed April 23, 1975.

Appendix B

Judgment Filed May 13, 1975 Dismissing
Action As Against The Bank

Appendix C

Opinion of District Court (Owen, J.)
Filed January 12, 1976

Appendix D

Opinion of District Court (Owen, J.)
Filed January 4, 1977 and Judgment
Entered January 17, 1977

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Browning Debenture Holders' Committee v.</u> <u>DASA Corporation (S.D.N.Y.)</u>	
Motley, J. slip op. May 8, 1972	5-6
Owen, J. slip op. April 16, 1975	8
Owen, J. slip op. April 21, 1975	3-4, 7
Owen, J. slip op. January 12, 1976	6-7
Owen, J. slip op. January 4, 1977	9
<u>Morris v. Cantor</u> , 390 F. Supp. 817 (S.D.N.Y. 1975)	13

	<u>Page</u>
 <u>Statutes and Rules</u>	
Civil Practice Law and Rules, Rule 3113(a)	14
Federal Rules of Appellate Procedure, Rule 28(a)(2)	2
Securities and Exchange Act of 1934 § 18(a), 15 U.S.C. § 785	11
Trust Indenture Act of 1939, 15 U.S.C. § 77--- <u>et seq.</u>	
§ 315(d)	4
§ 315(e)	1, 7, 10
§ 316(a)	4
§ 323	11
 <u>Other Authorities</u>	
Indenture dated as of July 1, 1967 between The Bank of New York and DASA Corporation, as amended	
§ 10.11	7, 9-10
§ 11.01(c)	4
§ 14.02	4
Report of the Senate Committee on Banking and Currency, No. 248, 76th Cong., 1st Sess., April 4, 1939	12

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----- x

BROWNING DEBENTURE HOLDERS' COMMITTEE, :
et al., :

Plaintiffs-Appellants, :

-against- :

Docket No. 77-7013

DASA CORPORATION, et al., :

Defendants-Appellees. :

----- x

BRIEF FOR APPELLEE
THE BANK OF NEW YORK

PRELIMINARY STATEMENT

This is an appeal by plaintiffs (i) from the judgment entered May 13, 1975 (Appendix A) dismissing the action as against defendant-appellee The Bank of New York (the "Bank") with prejudice and costs and with leave to apply for an award of reasonable attorneys' fees pursuant to Section 315(e) of the Trust Indenture Act, on the ground that plaintiffs failed to file an undertaking for the costs and attorneys' fees of the Bank pursuant to the memorandum and order of the District Court filed April 21, 1975 (Appendix B), and (ii) from the judgment entered January 17, 1977 (Appendix D) dismissing claims 3, 4 and 5

of the First Amended Complaint as against all defendants with prejudice and awarding the Bank as against plaintiffs Roy E. Brewer and Bradley R. Brewer, jointly and severally, \$7,000 for its reasonable attorneys' fees, with interest as provided by law.*

COUNTERSTATEMENT OF ISSUES
PRESENTED FOR REVIEW

The brief filed by plaintiffs Roy and Bradley Brewer omits any statement of the issues presented for review, as specifically required by Rule 28(a)(2) of the Federal Rules of Appellate Procedure. However, as evident from Points II, VI and XI of their brief, they have grievously misunderstood the issues for review as against the Bank, which are:

1. Whether the District Court had the power, in its discretion, to require plaintiffs to file an undertaking to pay the costs and reasonable attorneys' fees of the Bank in the action and, after an evidentiary hearing, to assess such costs and a portion of such fees against the plaintiffs.

* The action as between plaintiffs Simms C. Browning and the Bank was settled and is not before this Court.

2. Whether the District Court abused its discretion by (i) requiring from the plaintiffs the filing of such an undertaking, (ii) dismissing the action with prejudice and costs for failure to file such an undertaking within the prescribed period, and (iii) assessing against plaintiffs \$7,000 as a portion of the Bank's reasonable attorneys' fees.

COUNTERSTATEMENT OF THE CASE

The Bank is indenture trustee under the indenture dated as of July 1, 1967 between defendant DASA Corporation ("DASA"), as successor to Cyber-Tronics, Inc., and the Bank with respect to 6% convertible subordinated debentures due July 1, 1987 issued by DASA. Plaintiffs did not allege that DASA was in default under any provision of the Indenture or that the Bank was in possession of any material information about DASA not available to holders of debentures generally. Nor did plaintiffs allege that the Bank violated any section of the Indenture or failed to comply fully with all of the requirements, obligations and duties stated therein which are binding on the Bank. Indeed, after the denial of plaintiffs' motion for partial summary judgment against the Bank, Judge Owen noted (April 21, 1975 slip op. at 8) that "the Bank's conduct, from what I have before me, appears to

have been in accordance with the indenture and the Act."

In late 1971 DASA determined for various business reasons to reduce its outstanding senior indebtedness and improve its cash position by selling its computer systems, peripheral equipment and leases thereon. Plaintiffs have not questioned the wisdom or necessity of such steps. Indeed, they state (Br. at 17):

"Because of the corporation's financial crisis, the bondholders had no realistic choice but to submit the proxy consents solicited by DASA management and thus approve the proposed transaction. The only alternative available would have been corporate bankruptcy, patently an unacceptable result."

Although the debentures were subordinated and unsecured debt, the sale sought by DASA required the written consent of the holders of not more than 66 2/3% in the outstanding aggregate principal amount of the debentures under Section 14.02 of the Indenture, in accordance with Section 316(a) of the Trust Indenture Act, 15 U.S.C. § 77ppp(a)(1). Under that section the debenture holders' consents were binding instructions, which the Bank as indenture trustee was obliged to effectuate. Concomitantly, Section 11.01(c) of the Indenture and Section 315(d)(3) of the Trust Indenture Act, 15 U.S.C. § 77ooo(d)(3) protected the Bank for such action taken by it in good faith in accordance with the direction of a majority of the debenture holders.

By letter dated March 9, 1972 and supplemental letter dated April 21, 1972 (which specifically referred to

this action), DASA solicited from holders of the debentures consents to amendments of the Indenture to permit DASA to sell its computer systems, peripheral equipment and leases thereon and to reduce the conversion price of the debentures from \$42.42 to \$21.00. The Bank did not participate and was not alleged to have participated in the preparation or drafting of these letters. After a full trial between plaintiffs and DASA, Judge Owen found nothing false or misleading in either of these letters from DASA soliciting the consents (January 12, 1976 slip op. at 7-12).

While now volunteering that the sale of the computer equipment was urgently required by DASA, in the interests of shareholders and debentureholders alike, plaintiffs moved on March 30, 1972 in the District Court for a preliminary injunction against the sale. By April 28, 1972 the Bank had received from holders of debentures validly executed consents with respect to not less than 66-2/3% of the aggregate outstanding principal amount of the debentures, and the Bank's counsel so advised the Court. By memorandum and order filed May 8, 1972 the District Court (Motley, J.) denied plaintiff's motion for a preliminary injunction and held (slip op. at 7) that "[n]ow that the requisite consents are in, DASA is free to amend the indenture and consummate the sale".

Judge Motley correctly assessed plaintiffs' motive of seeking to obtain a private advantage by pursuing judicial intervention to force DASA to, if not over, the brink of bankruptcy. "[W]e suspect that much of the motivation for this suit is plaintiffs' desire to bargain defendants to a lower conversion price" (slip op. at 7).

What followed the denial of the preliminary injunction, the appeal from which was dismissed as moot by this Court, has wholly borne out Judge Motley's concern. At the close of the trial between plaintiffs and DASA, Judge Owen, "having the entire picture...,conclude[d] that this action was instituted and maintained to use the court as a negotiating tool, without any factual or legal basis for the myriad allegations pleaded against so many parties in the 53 page amended complaint" (January 12, 1976 slip op. at 15).

Plaintiffs stopped at no action to prevent the defendants from obtaining a just, speedy and inexpensive determination of the action. Plaintiffs resisted this Court's offer in 1972 to set the action down for immediate trial on the grounds that extensive discovery was required. But no discovery was taken. Instead, plaintiffs deluged the District Court, this Court and counsel

for defendants with a seemingly endless series of frivolous motions and interlocutory appeals. The principal of these are summarized in Judge Owen's opinions of April 21, 1975 (slip op. at 3-7) and January 12, 1976 (slip op. at 4-7, 12-20).

The height was reached, and the whole exemplified, in the events following plaintiffs' papable misconduct after the Bank requested a prompt trial in January, 1975, since no notice for any discovery had ever been served against it by plaintiffs, notwithstanding their representations to this Court and the District Court. On January 30 Judge Owen ordered the case to trial for May 5, 1975. Immediately thereafter, plaintiffs tried to delay the trial by baseless motions for partial summary judgment, which were renewed, after denial, by the misleading offer of a truncated document; motions for adjournment and the recusal of Judge Owen and a motion in this Court "in the nature of mandamus"; belated frenetic discovery and other diversionary tactics appearing in the record.

In self-defense the Bank sought, and received leave, to renew its motion for an undertaking pursuant to Section 10.11 of the Indenture and Section 315(e) of the

Trust Indenture Act.*

By memorandum and order filed April 16, 1975 Judge Owen denied plaintiffs' motions for partial summary judgment against DASA and the Bank and, noting that they were made "on the eve of trial where this case has been pending for about four years", found that they had been made "in bad faith" and "for the sole purpose of delaying the trial" (slip op. at 4-5). The Court further held (at 5), "given all the circumstances, that leave should be granted to defendant Bank of New York to renew its motion for security."

The posting of an undertaking in the amount of \$25,000 was required by order filed April 21, 1975. Plaintiffs filed no undertaking, and judgment for the Bank dismissing the action was entered on May 13, 1975 with leave

* The Bank had first moved for an undertaking by notice of motion dated January 26, 1973. By order dated February 8, 1973 Judge Griesa denied its motion "without prejudice to renewal at a later stage after further discovery has been completed." Ten months later no discovery had been taken and, at a December 1973 pretrial conference, Judge Griesa allowed the Bank to renew its motion and said that he would grant it unless plaintiffs satisfactorily resolved the discovery schedule and the apparent conflict of interest in the simultaneous representation of debt and equity security holders. See affidavit of David M. Olasov, sworn to March 22, 1974. By the time the motion was renewed in accordance with Judge Griesa's order on March 22, 1974, the action had been transferred to Judge Owen, who denied the Bank's motion in his "discretion" by order filed July 16, 1974.

to apply for an award of attorneys' fees. After an evidentiary hearing, such fees were fixed at \$7,000 (slip op. January 4, 1977). The District Court credited undenied evidence that a principal object in the refusal to file an undertaking was to take an appeal and force an adjournment of the trial. See affidavit of David M. Olasov, sworn to April 9, 1975. April 21, 1975 slip op. at 9; January 12, 1976 slip op., fn. at 7.

ARGUMENT

- I. The District Court Had The Discretion By Statute And Contract To Require Plaintiffs To File An Undertaking To Secure The Payment Of The Bank's Attorneys' Fees And Expenses And To Award An Allowance Of A Portion Of Such Fees To The Bank Against The Plaintiffs

By contract and statute the District Court had the power to require plaintiffs to file an undertaking for the Bank's costs and reasonable attorneys' fees.

Section 10.11 of the Indenture, which is contractually binding on every holder of debentures, provides:

All parties to this indenture agree, and each holder of any debenture by his acceptance thereof shall be deemed to have agreed, that any court may in its discretion require in any suit for the enforcement of any right or remedy under this indenture, or in any suit against the Trustee, the filing by any party litigant in such suit of an undertaking to pay the cost of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to

the merits and good faith of the claims or defenses made by such party litigant; but the provisions of this Section 10.11 shall not apply to any suit instituted by the Trustee, to any suit instituted by any debenture holder, or group of debenture holders, holding in the aggregate more than 10% in aggregate principal amount of the debentures then outstanding, or to any suit instituted by any debenture holder for the enforcement of the payment of the principal of or interest on any debenture on or after the due date expressed in such debenture.

Section 315(e) of the Trust Indenture Act of 1939, 15 U.S.C. § 7700(e), specifically authorizes such a provision. This enabling provision provides:

The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant: Provided, that the provisions of this subsection shall not apply to any suit instituted by any indenture security holder, or group of indenture security holders, holding in the aggregate more than 10 per centum in principal amount of the indenture securities outstanding, or to any suit instituted by any indenture security holder for the enforcement of the payment of the principal of or interest on any indenture security, on or after the respective due dates expressed in such indenture security.

These sections are applicable to the plaintiffs in this action, who hold less than 2% of the outstanding

aggregate principal amount of the debentures (see affidavit of James R. Keenan, sworn to January 26, 1973). By comparison, holders of more than 66-2/3% of the outstanding aggregate principal amount of the Debentures consented to the sale of DASA's computer equipment and the amendment of this indenture to permit the sale, after written notice of the pendency of this action.

Independently of any specific contractual provision relating to indemnification of costs, both Section 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78r, and Section 323 of the Trust Indenture Act of 1939, 15 U.S.C. § 77www(a), permit this Court to require an undertaking by a plaintiff for the payment of costs. Section 18(a) of the Securities Exchange Act of 1934 provides, in pertinent part:

In any such suit the court may in its discretion require an undertaking for the payment of costs of such suit, and assess reasonable costs, including reasonable attorneys' fees against either party litigant.

Section 323 of the Trust Indenture Act of 1939 provides, in pertinent part:

In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense.

Each of these provisions was enacted to protect a

party in the Bank's position from just such baseless and vexatious complaints as the one filed in the present case. The Report of the Senate Committee on Banking and Currency (No. 248, 76th Cong., 1st Sess. April 4, 1939) supports this conclusion -- indeed justifies a far broader use of the requirement of securing an indenture trustee's litigation costs:

"This subsection [Sec. 315(e)] provides further protection for the trustee against the risk of groundless law suits. Under it, the court may in its discretion require the plaintiff to file an undertaking to pay the costs of suit, and may assess reasonable costs, including reasonable attorneys' fees, against any party to the suit, having due regard to the merits and good faith of their respective claims. Under the present practice, of course, where the trustee successfully defends a groundless suit, he receives only "statutory costs" -- three or four dollars for the service of an answer, \$10 for the filing of motions, and so on. He does not now receive his actual expenses, or his actual attorney's fees.

Under this section, by agreement of the parties themselves expressed in the indenture, the trustee would be entitled to his actual expenses, including reasonable attorney's fees. What is more, the court might, in its discretion, require the plaintiff to file at the very outset sufficient security to cover such costs if his claim should be defeated. A similar provision in the New York statutes has effectively broken up what amounted to a racket in the early thirties -- the practice of bringing groundless suits for accountings against trustees."

(Report at 284)

II. The District Court Did Not Abuse Its
Discretion By Requiring Such An
Undertaking And By Awarding \$7,000
In Attorneys' Fees To The Bank

The propriety of the District Court's exercise of discretion is manifest from the record plaintiffs have made in this Court as well as in the Court below. Plaintiffs' suggestion that the apparently wilful presentation of an incomplete document in support of a motion for rehearing of the denial of the motion for partial summary judgment is somehow justified or excused by Morris v. Cantor, 390 F.Supp. 817 (S.D.N.Y. 1975), is inconceivable.

In view of the circumstances, as developed at early stages of this litigation, the case against the Bank was groundless and a ripe candidate for the exercise of § 315(e), which has acted as a modest protection of indenture trustees. The sale of the computer equipment was necessary and admittedly in the interests of all DASA security holders. More than 66-2/3% of the debenture holders gave their consents to the sale, even after receiving notice of plaintiffs' claims, such as they were. And plaintiffs concede that it would not have been prudent for them to have withheld such consents.

The fees of the Bank were fixed after a full evidentiary hearing in which the services of counsel for the Bank were put on the record. Moreover, even though

the reasonableness of the Bank's application for \$30,000 in attorneys' fees plus disbursements was not contradicted by any offer of evidence by plaintiffs,* Judge Owen awarded only \$7,000 as fees for a portion of such services.

III. The Other Errors Assigned By Plaintiffs
Are Irrelevant To The Propriety Of The
Judgment In The Bank's Favor

Plaintiffs also assign error to the District Court's refusal to permit them to take depositions by tape recorder, which they proposed to transcribe themselves and let the defendants "review" the in-house transcriptions for accuracy. Compare CPLR Rule 3113(a).

Even if such an outlandish suggestion should have been seriously entertained, the "error" is harmless insofar as the Bank is concerned, first, because no depositions of any Bank employee were noticed until after the Bank moved in April 1975 for the undertaking and further proceedings were thereafter stayed; and, second, because Bank personnel in fact testified at the trial between plaintiffs and DASA.

Finally, the repeated claim that Sullivan & Cromwell influenced the judicial selection process and thereby Judge Owen's judgment and deliberations (Pl. Br.

* Plaintiffs grossly misstate (Br. at 102) the testimony as to how the fees of Sullivan & Cromwell to the Bank were determined. The testimony was that Edward Keane fixed the fee upon a balanced consideration of all the factors enumerated in the Code of Professional Responsibility, including the amount of time spent.

at 69-74) is so meritless and offensive that we say nothing further about it beyond noting that plaintiffs have already advanced the idea to this Court and had it rejected out of hand.

CONCLUSION

The record before this Court establishes beyond any doubt that the District Court acted with great patience and restraint in this action, which was advocated by plaintiffs vexatiously and in bad faith. At least a portion of the burden of this case should be placed upon these plaintiffs, as the District Court found by assessing a very modest award of attorneys' fees in favor of the Bank pursuant to contract, statute and clear legislative intent. The judgment in favor of the Bank should be affirmed, with all costs.

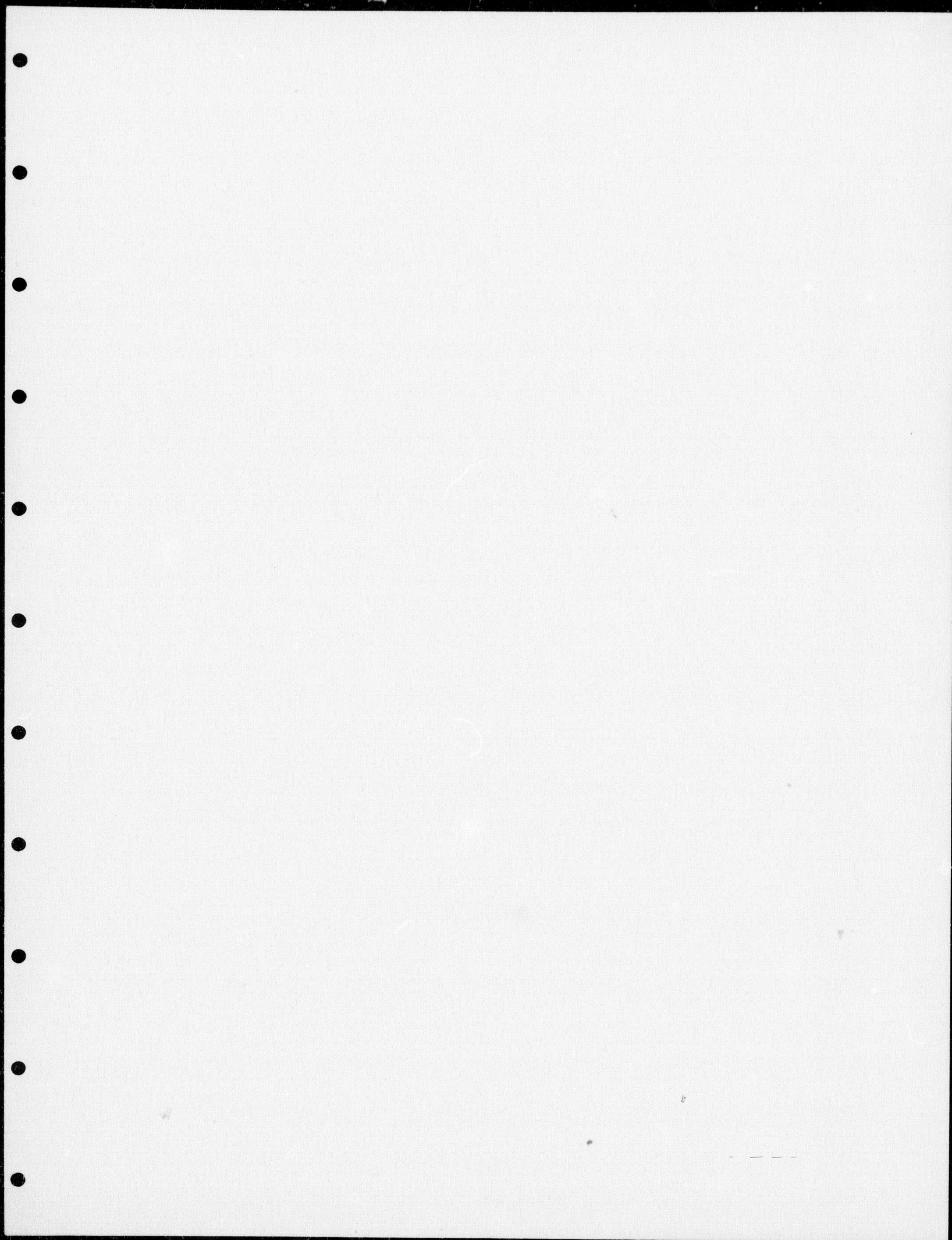
Respectfully submitted,

SULLIVAN & CROMWELL
48 Wall Street
New York, N.Y. 10005
(212) 952-8100

Attorneys for
The Bank of New York

Edward W. Keane,
David M. Olasov,
Of Counsel

March 28, 1977



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED	_____
SIGNED	_____
SERVED	_____
RECEIVED	23 April 75
DIARY	_____
REGISTER	NT
EXAMINED	_____

APR 21 1 01 PM '75

-----X
BROWNING DEBENTURE HOLDERS' COMMITTEE,
et al.,

Plaintiffs,

72 Civ. 1332

-against-

MEMORANDUM AND ORDER

DASA CORPORATION, et al.,

Defendants.
-----X

42276

OWEN, District Judge.

This is a renewed motion by defendant The Bank of New York (the "Bank") for an undertaking from the plaintiffs for the Bank's costs, including attorneys' fees, pursuant to §10.11 of the indenture* and §315(e) of the

*Section 10.11 of the indenture provides:

All parties to this indenture agree, and each holder of any debenture by his acceptance thereof shall be deemed to have agreed, that any court may in its discretion require in any suit for the enforcement of any right or remedy under this indenture, or in any suit against the Trustee for any action taken or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses

(cont'd on p.2)

Trust Indenture Act of 1939, 15 U.S.C. §77 ooo(e).^{*} Although in the exercise of discretion I denied the Bank's motion for an undertaking in July 1974, events since that time make it appropriate to now grant the motion since there now appears to be a reasonable possibility that the Bank, in its capacity as an indenture trustee of a class of debentures not in default, is being subjected to unfounded litigation in this action, costly to defend. I therefore direct that the

(fn. from p. 1 cont'd)

made by such party litigant; but the provisions of this Section 10.11 shall not apply to any suit instituted by the Trustee, to any suit instituted by any debenture holder, or group of debenture holders, holding in the aggregate more than 10% in aggregate principal amount of the debentures then outstanding, or to any suit instituted by any debenture holder for the enforcement of the payment of the principal of or interest on any debenture on or after the due date expressed in such debenture.

*Section 315(e) of the Trust Indenture Act of 1939 provides:

The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant: Provided, That the provisions of this subsection shall not apply to any suit instituted by such trustee, to any suit instituted by any indenture security holder, or group of indenture security holders, holding in the aggregate more than 10 per

(2)

(cont'd on p.3)

action. costly to defend. I therefore direct that the

plaintiff post a bond in the amount of \$25,000.

I gave much consideration to this question at the time of the prior motion to grant this relief, since two other Judges of this Court had indicated that they had substantial doubt as to the validity of plaintiffs' claims and the bona fides of their motives, and I noted that Judge Greisa had already dismissed two of plaintiffs' five causes of action, and that no significant discovery had been undertaken against the Bank. On January 30, 1975, the action was set for trial on May 5, 1975. It was not until after I denied the plaintiffs' motion for summary judgment against the Bank from the bench on March 28, 1975 and simultaneously invited the Bank to renew its application for security that plaintiffs commenced discovery against the Bank. This is in abeyance pending resolution of the Bank's motion for a protective order and the ruling on the undertaking herein.

A brief review of prior proceedings is in order. This action was commenced March 30, 1972. The plaintiffs' causes of action arise essentially out of defendant DASA Corporation's actions in 1972 soliciting the consents of

(fn. from p. 2, cont'd)

centum in principal amount of the indenture securities outstanding, or to any suit instituted by any indenture security holder for the enforcement of the payment of the principal of or interest on any indenture security, on or after the respective due dates expressed in such indenture security.

its debenture holders to amendments of the indenture to reduce the conversion price of \$42.42 to \$21.00 and to permit DASA to sell certain computer systems to raise needed cash for its operations.

In denying plaintiffs' motion for a preliminary injunction to prevent DASA from disposing of these assets, Judge Motley in May 1972, observed:

In fact, we suspect at much of the motivation for this suit is plaintiffs' desire to bargain defendants to a lower conversion price.

Thereafter, although the sale sought to be enjoined had already been consummated, plaintiffs took an appeal from Judge Motley's decision. The Second Circuit dismissed said appeal as moot. At the oral argument of DASA's motion to dismiss, the Court of Appeals suggested it might direct the District Court to set the action down for immediate trial. Plaintiffs' counsel declined this offer, asserting that extensive discovery was required.

On May 19, 1973, plaintiffs moved for a class action determination. Judge Griesa deferred ruling on the motion until after discovery in order to define what issues were being allegedly pursued on behalf of what class.

Plaintiffs never took discovery. Instead, shortly thereafter plaintiffs moved for summary judgment on Claims 1 and 2. DASA also moved for summary judgment

dismissing the same claims. Defendant Arthur Andersen & Co.,
the accounting firm, pointing out that no relief was sought
against it on those claims, joined DASA's motion.

On October 1, 1973, Judge Griesa dismissed
Claims 1 and 2 against all parties, on the ground that they
were moot and stated no valid claim for damages. In his
opinion, he observed that

"The real 'injury' which plaintiffs are
seeking to cure is their failure to achieve
the low conversion price for the debentures
and possibly debenture representation on the
board."

Although manifestly untimely, approximately
5-1/2 months later plaintiffs moved for reargument. The
action had in the interim been reassigned to me. I denied
reargument on July 16, 1974.

At the same time, plaintiffs again moved for
class action determination, although no discovery had been
taken in the period of over a year since Judge Griesa had
made discovery a condition precedent to a renewal of the
class action application. I denied the class action motion,
holding that there was no class to be represented.

Plaintiffs then moved for an order 1) directing
that depositions be taken through the use of a tape-recording
device, and also 2) directing DASA to submit and serve
proposed findings of fact with respect to Claim 3 of the

complaint. This motion was denied on October 11, 1974.

Plaintiff then took an appeal from the interlocutory order denying the use of a tape recorder and denying the demand for DASA to submit proposed findings of fact. This appeal is still pending.

On January 30, 1975, I set the trial for May 5, 1975. Since then, plaintiffs' counsel has moved for summary judgment on Claim 4 against The Bank of New York, and for a partial summary judgment on Claim 3. The former motion was denied from the bench on March 28, 1975, and the latter by opinion dated April 12, 1975. Plaintiffs also moved in the Court of Appeals by way of mandamus to adjourn the trial until the appeal was heard on the already dismissed claims 1 and 2 declared moot by the Court of Appeals. The mandamus was denied from the bench on April 1, 1975. Since April 7, plaintiff has moved for (1) reargument of the denial of partial summary judgment against the Bank on Count 4, (2) for partial summary judgment against the Bank and DASA on the same Count 4 on alleged new grounds,* and (3) sought

*There is now before me a new motion by plaintiffs for partial summary judgment against the Bank on the theory that the Bank is liable to the plaintiffs because DASA gave it an "indemnity" letter in connection with certain unspecified "services" it was performing in connection with DASA soliciting the said debenture holders' consents.

leave to add new parties and a new claim and demanded a substantial adjournment of the trial to permit discovery thereon.

Focusing on the Bank's motion for security for costs, from a study of the complaint it appears that the same claim as to which I have just denied plaintiffs summary judgment will be the essence of plaintiffs' claim against the Bank on the trial.* On the argument of the motion on March 28, 1975, plaintiffs' counsel acknowledged that plaintiffs' theory was novel and without judicial support.**

*Plaintiffs' claim is that a trustee under an indenture is required, even with no default in prospect, to assess a change in the terms proposed by management, form an opinion as to its propriety and fairness and communicate that opinion to the debenture holders prior to their vote. The Bank contends that as a trustee under a specific indenture, its duties are specific and only commence upon a default. Keeping in mind that the question before the Court is the Bank's right to security for costs and fees in the event plaintiffs' action fails against them, even assuming the plaintiffs were correct as to the Bank's obligation, the Bank could only be liable to plaintiffs in the event that plaintiffs succeeded in their claims against DASA.

**Notwithstanding this concession, plaintiffs have moved to reargue this motion along with all the other motions since filed in early April, requiring the Bank to expend time and money to oppose.

By virtue of both the trust indenture and the Act itself, the Court has the power to require plaintiffs to file an undertaking for the Bank's costs and attorneys' fees. Section 315(e) of the Trust Indenture Act was enacted to protect a party in the Bank's position from the possibility of defending against baseless and vexatious actions.

In considering the appropriateness of an undertaking, I note that the Bank's conduct, from what I have before me, appears to have been in accordance with the indenture and the Act. Thus following DASA's solicitations of the consents from the debenture holders, the Bank received the requested consents to the sale of these assets by more than 66-2/3% of the aggregated outstanding principal amounts of the debentures. After the denial of plaintiffs' motion for a preliminary injunctions in 1972, the Bank, pursuant to its obligations under the original indenture, executed the supplemental indenture authorizing the sale of the assets as it was obligated to do. Section 14.02 of the indenture makes clear that "any consent given by the holder of debentures pursuant to this §14.02 shall be conclusive and binding upon such holder and upon all future holders and owners thereof or of any debenture issues in lieu thereof or in exchange therefor, irrespective of whether any notice of such consent is made upon the debentures". Section 11.01(c) of the indenture excuses the Bank from any liability with respect to any action taken in good faith in accordance with the

direction of the debenture holders -- here more than the 66-2/3% required for an amendment. In view of all the above, it appeared that the motion also had the earmarks of being brought on for the purpose of delaying the May 5th trial.

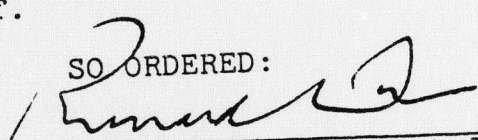
Unfolding events appear to support this conclusion. The first of these is the plethora of motions* filed by plaintiffs' counsel in April since the denial of the last round (see p. 6 supra). The second is the fact that according to the Bank's counsel, plaintiffs' counsel told him that if an undertaking were ordered by the Court here, plaintiffs' counsel would refuse to post it in order to force an adjournment of the trial. This statement in the affidavit of the Bank's counsel annexed to the Bank's motion papers of April 9, 1975 is not denied by plaintiffs' counsel in either of his subsequent affidavits of April 15 or 16, 1975, the affidavit of April 15 being specifically denominated by plaintiffs as being "in opposition" to that motion.**

*These include a motion to reargue the denial of the motion for summary judgment which plaintiffs' counsel conceded had no precedential support.

**Equally undenied is the claimed threat of harrassment to the Bank when on April 9, 1975, plaintiffs' counsel advised the Bank's counsel that the next day some nine officers of the Bank would be "subpoenaed" for pretrial examinations.

Given all the foregoing, I conclude that The Bank of New York is entitled to an undertaking by plaintiffs for its costs and attorneys' fees herein pursuant to the Trust Indenture Act. Plaintiffs are directed to procure such an undertaking in the amount of \$25,000 running to the Bank, which shall be filed with the Court not later than April 25, 1975. All proceedings against the Bank are stayed until the filing thereof.

SO ORDERED:


United States District Judge

April 18, 1975.

Copy.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BROWNING DEBENTURE HOLDERS'
COMMITTEE, et al.,

Plaintiffs,

-against-

DASA CORPORATION, et al.,

Defendants.
-----X

#42276
72 Civ. 1332

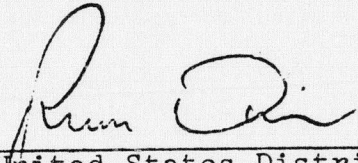
SUPPLEMENTAL ORDER

OWEN, District Judge.

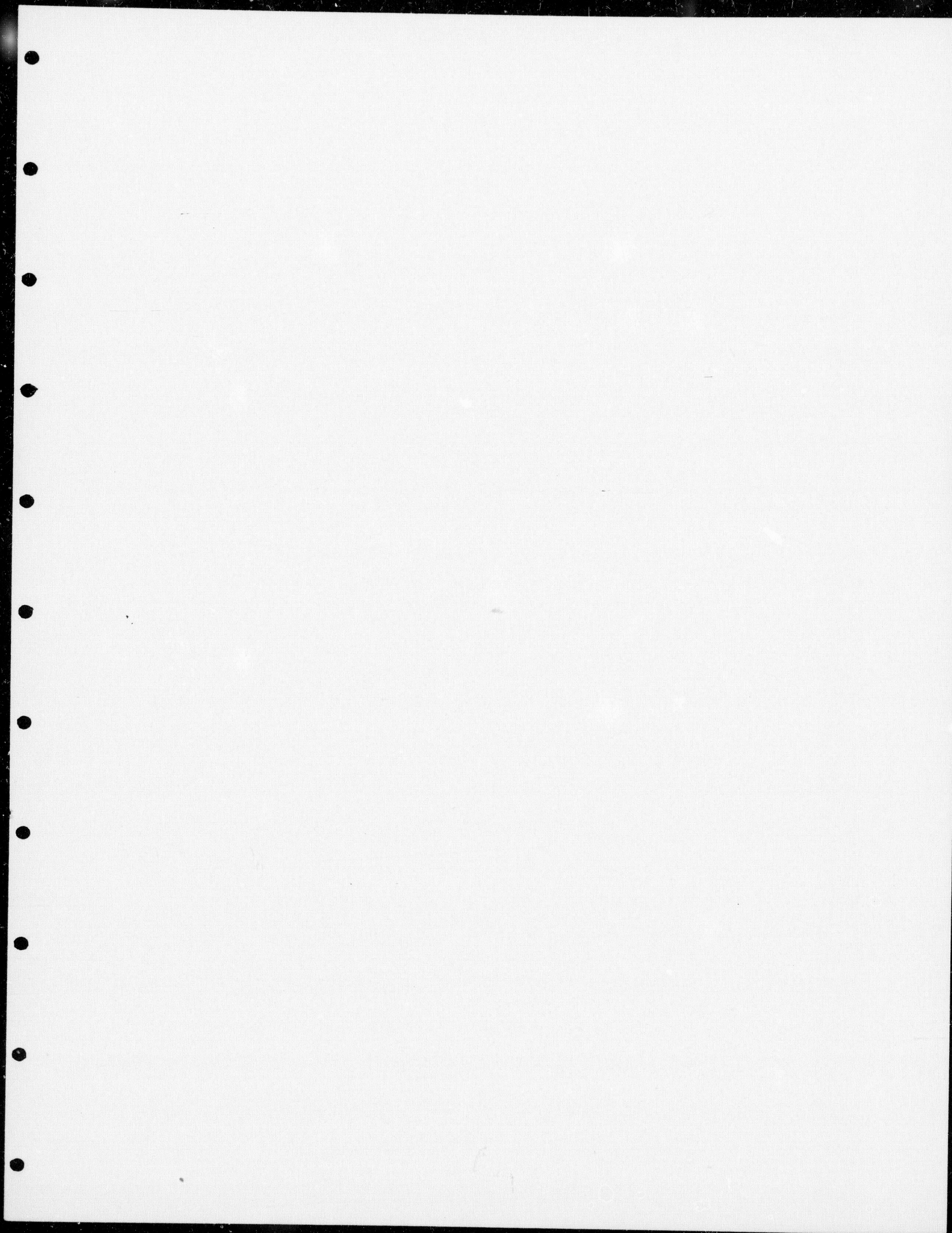
My memorandum and order of April 18, 1975
is amended to read as follows: page nine (9) the first
full sentence is deleted and in its place the following
sentence is substituted.

In view of all the above, it appeared that
the plaintiffs' first summary judgment
motion against the Bank also had the
earmarks of being made for the purpose
of delaying the May 5th trial.

It is so ordered.


United States District Judge

April *24*, 1975.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BROWNING DEBENTURE HOLDERS' COMMITTEE, :
et al., :
 :
Plaintiffs, : 72 Civ. 1332
 : (R.O.)
-against- :
 :
DASA CORPORATION, et al., :
 :
Defendants. :
 :
-----x

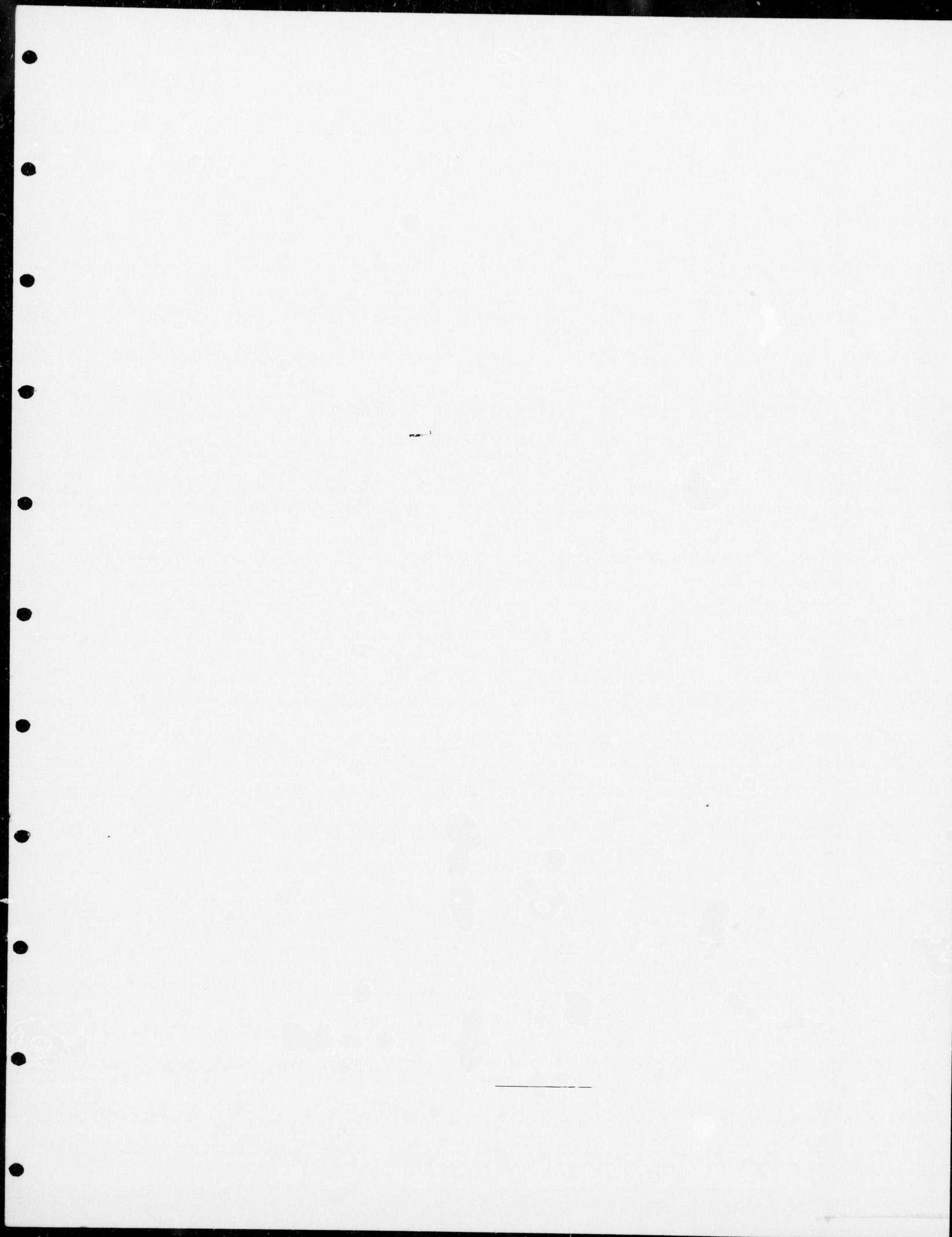
The Court having filed a Memorandum and Order on April 21, 1975 (a) requiring plaintiffs, pursuant to Section 315(e) of the Trust Indenture Act, to procure and file with the Court not later than April 25, 1975 an undertaking in the amount of \$25,000 for the costs and attorneys' fees of defendant The Bank of New York (the "Bank"), and (b) staying all proceeding against the Bank until the filing of such undertaking, and plaintiffs having failed to file such undertaking by the specified date and their counsel having represented to the Court that no such undertaking would be filed, and there being no just reason for delay of entry of this judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, it is

ORDERED, ADJUDGED AND DECREED that this action be dismissed as to the Bank, on the merits, with prejudice and with costs, and that the Bank shall have leave to make an application to the Court for an award of reasonable attorneys' fees pursuant to Section 315(e) of the Trust Indenture Act.

Dated: May 8th, 1975

Richard Owen
U.S.D.J.

Judgment Entered 5/13/75
Raymond A. Bingham



ENTERED

copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BROWNING DEBENTURE HOLDERS'
COMMITTEE, et al.,

Plaintiffs,

-against-

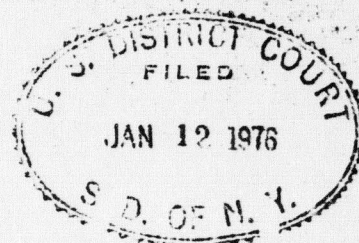
DASA CORPORATION, et al.,

Defendants.
-----X

72 Civ. 1332

#43701

OPINION AND ORDER



OWEN, District Judge

This case was tried before me without a jury over six days in June 1975. The complaint, filed in 1972, originally had five causes of action arising out of the DASA Corporation's ⁽¹⁾ proposal to sell and the eventual sale of certain of its computer equipment to raise needed cash. The sale required the approval of its debenture holders, which included the two individual plaintiffs, Sims R. Browning and Roy E. Brewer, together

(1)

DASA is a Massachusetts corporation manufacturing electrical equipment used in connection with telephone instruments.

(2)
with Bradley R. Brewer, plaintiffs' counsel herein, who denominated themselves as plaintiff "Browning Debenture Holders Committee." As part of the proposal to the debenture holders, DASA proposed to reduce the conversion price of the debentures into common stock from \$42.42 to \$21.00.

Five causes of action alleging various wrongs were asserted against various defendants including DASA Corporation; The Bank of New York, trustee under a Trust Indenture covering plaintiffs' debentures; Arthur Andersen & Co., the then auditor of the corporation; and various individual defendants, officers and directors of DASA. At the outset, only DASA, the Bank and Andersen were served. (3)

Of the five causes of action, the first two alleged that the proxy materials and shareholders reports in connection with the DASA annual meeting in 1972, and the DASA financial statements for 1971, were misleading. The implication flowing from these allegations was that the scheduled 1972 DASA stockholders' meeting was illegal

(2)
Bradley R. Brewer, plaintiffs' counsel and a member of the "Committee" is the son of plaintiff Roy E. Brewer. The two Brewers and Browning owned \$127,000 of said debentures.

(3)
Three years after filing the action, and on the eve of trial, certain individual defendants were served. I dismissed the complaint as to them on motion. (See infra, p. 19).

since the proxies to be used therein were fraudulently solicited. Judge Motley denied a preliminary injunction, permitted the meeting and allowed the sale of the equipment that was there duly voted. Judge Greisa thereafter dismissed the first two causes of action as moot. ⁽⁴⁾

This ruling left causes of action 3, 4 and 5.

The 5th, purporting to be a derivative claim against Andersen, alleged that the auditors (1) omitted a material item in the annual report of 1970; (2) that this omission was corrected in the 1971 report; and (3) that the 1971 report failed to state that the omission had been made in the prior (1970) report. Plaintiffs then claimed that Andersen, knowing that its opinions would be sent with the proxy materials to the shareholders in 1971 and 1972, breached its duty of care to the corporation by the said actions. On this basis, plaintiff demanded up to \$3,000,000 in damages running to the corporation, without any allegation as to how these damages were occasioned by the claimed omissions.

(4)

This order, filed on October 1, 1973, was the subject of a motion to reargue before me five months later in 1974. It was denied. The Court of Appeals affirmed on October 3, 1975.

The 5th cause of action, on motion by Andersen, was dismissed by me in an opinion dated April 18, 1975 ⁽⁵⁾ for failure to allege damage or comply with Fed.R. Civ. P. 23.1.

This ruling left only the 3rd and 4th causes of action.

The 4th cause of action was solely against The Bank of New York, the trustee under the Trust Indenture covering the plaintiffs' debentures. Plaintiffs' claim was that the Bank, as trustee, had a duty to form a judgment as to the fairness and propriety of the reduction of the conversion price of the debentures proposed by management and communicate that opinion to the debenture holders prior to their vote.

The demise of that cause of action (the 4th) came about as follows. In January 1975, a trial date had been set for May. In March and April plaintiffs belatedly commenced a whirlwind of activity with the obvious design of delaying the trial.⁽⁶⁾ This included numerous notices to depose Bank employees, a motion for partial summary judgment against the Bank, and a motion

(5)

Andersen was also named as a "defendant" in the 3rd cause of action but no facts were asserted warranting its inclusion. It was dismissed as to that claim as well. These rulings removed Andersen from the case.

(6)

Included was a mandamus in the Court of Appeals to stay the trial, which was denied from the bench.

to add DASA's lawyers as defendants, together with a request for a six months' adjournment on the ground that DASA had coercively subverted the Bank and made an alleged pay-off to it.

From the moving papers, this latter motion seeking to add attorneys as defendants and raising charges of illegality, initially appeared to have some substance being apparently based on the contents of a "one page" letter of DASA's counsel to the Bank, a "copy" of which was annexed to plaintiff's moving papers. DASAs answering papers, however, disclosed that the alleged "letter" was but the last page of a three page letter, the first two pages revealing the context and therefore the propriety of the entire matter. That motion was summarily denied.

At the same time, upon the argument of plaintiffs' motion for partial summary judgment against the Bank on the ground of the Bank's alleged duty to investigate the proposal and give its opinion to the debenture holders, plaintiffs' counsel orally acknowledged

that there was no existing legal support for the relief
(7)
requested.

I denied this motion as well, observing that both the motion and the complaint sought the identical relief against the Bank. Given the lack of legal support for the allegations against the Bank, and plaintiffs' misuse of the "one page" letter in the companion motion, I directed that the plaintiffs furnish an undertaking to the Bank in the amount of \$25,000 for costs and attorneys' fees in the event I later determined that such payment was justified, the risk of which was becoming apparent. The plaintiffs,

(7)

Indeed, the law is to the contrary. The Bank has no duty to pass on the terms of the proposed reduction or inform the debenture holders of their propriety. Pursuant to specific statutory authorization set forth in Section 315(a) of the Trust Indenture Act of 1939, 15 U.S.C. § 77000(a) the DASA Trust Indenture, § 4.10 contained a provision which specifically relieved the Bank of "any duty of responsibility to make or cause to be made any adjustment of the conversion price. . . or to determine whether any facts exist which may require any of such adjustments, or with respect to the nature or extent of any such adjustments" Indeed, were the Bank to have acted as the plaintiffs contended it should, it would have exposed itself to liability not only were its advice to be erroneous, but also for exceeding the powers specifically conferred by the trust indenture. Cf. Colorado S.R. Co. v. Blair, 214 N.Y. 497, 108 N.E. 840 (1915).

alleging financial inability, declined to furnish the said undertaking and I dismissed the 4th cause of action upon
(8)
being authoritatively so informed.

All the foregoing left but one cause of action, the 3rd. This was solely against defendant DASA, involving the March 9, 1972 solicitation letter seeking the debenture holders' consent to the release for sale of the computer equipment and providing for a reduction from \$42.42 to \$21.00 of the conversion price of the debentures. Plaintiffs claimed that the March 9 letter contained certain false statements as to material facts and omitted other alleged material facts. Those alleged material misstatements and omissions were set forth in 21 assorted paragraphs. In a conference with all counsel the day before the trial, plaintiffs' counsel withdrew the allegations of paragraph (h) (i) - (vii).

Thereafter the trial commenced. One of the allegations pleaded in various ways and places in the 3rd cause of action was that the Board of Directors owed a duty to

(8)

There is evidence (which I credit because, although clearly brought to plaintiffs' counsel's attention, it was not timely denied) that plaintiffs' counsel advised the attorney for the Bank that the refusal to pay for the undertaking was motivated by a desire to take an appeal from the dismissal and force an adjournment in the trial. This is consistent with much other conduct of plaintiffs in the hectic weeks before the trial at which time plaintiffs were pursuing numerous avenues to force a delay.

consider the debenture holders interests in setting the proposed new lower conversion price. Concluding that there was no such duty as long as all the facts were fairly set forth from which the debenture holders could reach an intelligent, well-informed conclusion as to whether or not to accept the proposal,⁽⁹⁾ I dismissed paragraphs (a), (c), (d), (l), (m) and (n). Further, having concluded that the Bank of New York had no duty either to form an opinion as to the "fairness" of the proposal, or to communicate any such opinion to the debenture holders (see supra), it necessarily followed that DASA had no duty to advise the debenture holders that the Trustees had taken no position in that regard. I therefore dismissed paragraph (e). Also, during the trial, plaintiffs' counsel, upon questioning, withdrew the allegations of paragraphs (f) and (s), and, it appearing that (g) had been alleged by plaintiffs in error, that claim, too, was withdrawn.

This left for resolution at the close of the trial the allegations of the following paragraphs: (b), (i),

(9) Abramson v. Nytronics, Inc., 312 F. Supp. 519, 524 (S.D.N.Y. 1970).

(j), (k), (n), (o), (p), (q), (r), (t) and (u).

After six days of trial, I conclude that no substantial evidence was offered by plaintiffs in support of any of the said allegations.

As to any possible "conflict of interest" of DASAs officers and directors alleged in paragraph (b), the holdings of the various members of DASA Management are extensively set forth in the March 9th letter and no evidence was adduced before me on the subject of any error or omission in the information presented. Paragraph (b) is dismissed.

No proof was offered whatsoever as to anything remotely connected with Massachusetts law as bearing upon the allegations of paragraphs (i) and (j) and they are therefore dismissed.

The contention in (k) was that the solicitation letter was allegedly incomprehensible to an unsophisticated reader in its treatment of the right of DASA to dispose of the equipment and leases. I find this, upon reading the allegedly offending section, to be without merit. I conclude that a reasonable reader would have no confusion as to the scope of the authorization to sell the equipment and leases to which he was asked to consent.

Paragraph (k) is therefore dismissed.

The allegations of Paragraph (n) do not seem to delineate facts which constitute a wrong, and I do not, upon study of the two instruments, find anything in the shareholders' proxy statement at page 7 which "appears to be in direct conflict" with anything on page 3 of the March 9 letter. Paragraph (n) is dismissed.

Paragraph (o) alleges that a reader must make a cross reference from page 5 to make sense of certain of the material on page 12 of the March 9 letter. I fail to see that is necessary in order to be able to understand what is stated in either place and no evidence was presented to me of any false or misleading statements concerning the "Magical Business." Paragraph (o) is dismissed.

Paragraph (p) alleges that certain language has the effect of creating confusion. From a reading of the March 9 letter, I consider the allegations are frivolous and dismiss Paragraph (p).

Paragraph (q) alleges an implication in the March 9 letter that if the debenture holders do not consent to the requested amendment to the Indenture there will be a forced

liquidation of DASA, and the debenture holders will receive nothing. The text does not support the allegation. (10)

Paragraph (q) is dismissed.

Paragraph (r) alleges, in essence, that the use of the proceeds of the sale of the equipment and lease and the benefit to DASA from this sale is in no way clearly stated. However, I find at page 17 of the March 9th letter a sufficiently clear statement that the proceeds of the sale would be used first to eliminate "senior indebtedness of approximately \$833,000 and the balance applied to reducing the principal of DASA's revolving short-term bank credit line approximating \$1,228,000, and remaining funds, if any, thereafter to be added to the general funds of DASA." Paragraph (r) is dismissed.

Paragraph (t) alleges a failure to advise the debenture holders of the income tax consequences of the proposal. However, since the transaction did not involve either a

(10)

The allegedly offending text reads: "It should be noted that a sale of the Equipment and Lease upon a forced liquidation would probably result in a lower sales price than that to be received from the presently proposed sale which resulted from arms-length negotiations."

"granting or extension of any options, warranties or rights to purchase 'securities' or the issuance or exercise of any options" there were no tax consequences to discuss. Paragraph (t) is dismissed.

Paragraph (u) alleges a failure to disclose that DASA is giving or has given serious consideration to the "possibility of making at some time in the near or foreseeable future" another proposed reduction in the proposed conversion price. No evidence was offered on this subject and no amendment of this type has apparently ever been proposed. Paragraph (u) is dismissed.

The foregoing determinations dispose of the balance of the 3rd and last of the causes of action, leaving nothing behind but the large and disturbing question of the plaintiffs' good faith in instituting and maintaining the action.

Turning to that subject, during the trial itself, Sims Browning, one of the named plaintiffs and a member of plaintiff-Browning Debenture Holders Committee, and himself a professional securities analyst, was asked:

Q. If DASA had reduced the [conversion] price, the suit would not have been commenced?

A. Yes.

Also, Bradley Brewer, attorney for plaintiffs and a member of the plaintiff "Committee" as well, acknowledged upon the trial the following critical facts: (1) that DASA desperately needed the money that was to be raised by this proposed sale of computer equipment; (2) that he (attorney Brewer) was possessed of no evidence that the proposed sales price was unfair; and (3) that the monies were used as the proposed agreement had stated that they would be used.

Also received in evidence on the trial was a certain letter dated March 16, 1972, written by plaintiffs' attorney stating that the then existing stalemate in arriving at what plaintiffs demanded as a conversion price would cause litigation by said plaintiffs which

might seriously delay (or prevent altogether) the proposed sale of computer assets and otherwise work in ways damaging to the operation of the Corporation and the interests of the Corporation's shareholders and creditors alike.

The coercive intent of this letter is clear and inescapable. Plaintiffs' attorneys, at the same time, demanded that DASA include in a letter to be sent to debenture holders the statement

that the debenture holders as a group withhold their consent to

the proposed sale of assets until the Corporation's Management agrees to reduce the new conversion price of the debentures to a number not more than \$12.00 and not less than \$6.00 [reasonably related to the present market value of the common stock and acceptable to plaintiffs.]

From the above coercive 1972 letter at the outset to plaintiff Browning's 1975 trial testimony at the close, coupled with a lack of merit in any corner of the case, it is now clear that Judge Motley was correct in May 1972 when she wrote

In fact, we suspect that much of the litigation for the within suit is plaintiffs' desire to bargain defendants to a lower conversion price,

and that Judge Greisa was right in October 1973 when he observed

the real "injury" which plaintiffs are seeking to cure is their failure to achieve the low conversion price for the debentures

This is further confirmed by one of plaintiffs' demands for relief in their post-trial submission, which seeks a present reduction of "the debenture conversion price to a point equal to the current market price of the common stock."

Consequently, at this time, having the entire picture before me, I conclude that this action was instituted and maintained to use the court as a negotiating tool, without any factual or legal basis for the myriad allegations pleaded against so many parties in the 53 page amended complaint.

In support of this conclusion, a review of some of the many details of this proceedings is appropriate. The action was commenced on March 30, 1972. In May 1972 Judge Motley denied the plaintiffs' motion for a preliminary injunction to prevent DASA from disposing of the assets which were the subject of the action. Thereafter, although the sale sought to be enjoined had already been consummated, plaintiffs took an appeal to the Second Circuit, which appeal was dismissed as moot. On the oral argument of DASA's motion to dismiss, the Court of Appeals suggested that it might direct the District Court to set the action down for immediate trial. Plaintiffs' counsel declined this offer, asserting that extensive discovery was required. Almost a year later, in May of 1973, plaintiffs moved for class action determination. Judge Greisa deferred ruling on that motion until after discovery in

order to define the issues that were allegedly being pursued on behalf of the class. Plaintiffs never took discovery. Instead, shortly thereafter, they moved for summary judgment on claims 1 and 2 and DASA also moved for summary judgment dismissing the same claims. Defendant Arthur Andersen, pointing out that no relief was sought against it on those claims, joined DASA's motion.

In October of 1973, Judge Greisa dismissed claims 1 and 2 against all parties on the ground that they were moot and stated no valid claim for damages. Although manifestly untimely,⁽¹¹⁾ approximately five and one-half months later, plaintiffs moved for a reargument. The action in the interim had been reassigned to me and the motion for reargument was denied in July 1974. At the same time plaintiffs again moved for class action determination although no discovery had been taken in the period of over a year since Judge Greisa had made discovery a condition precedent to the renewal of the class action

(11)

Rule 9(m) of the General Rules of this Court prescribes a ten day limit for the filing of a notice of motion for reargument.

application. I denied the class action motion, holding that there was no class to be represented. Plaintiffs then moved for an order (1) directing that depositions be taken by a tape recording device, and (2) directing DASA to submit and serve proposed findings of fact with respect to the third cause of action. This motion was denied in October of 1974. Plaintiffs then took an appeal from the order denying the use of a tape recording and denying the demand of DASA to submit proposed findings. This was consolidated with the earlier appeal taken by plaintiffs from the denial of the motion to reargue the dismissal of Counts 1 and 2.⁽¹²⁾

On January 30, 1975 I set the trial for May 5, 1975. Thereupon plaintiffs' counsel moved for summary judgment against the Bank of New York on the 4th cause of action. That was denied from the Bench on March 28, 1975. Plaintiff also moved for partial summary judgment against DASA on claim 3. That was denied in an opinion dated April 12. Plaintiffs also moved in the Court of Appeals by way of mandamus to adjourn the trial until the appeal was heard on the already dismissed claims declared

(12)

The dismissal of Counts 1 and 2 was affirmed on the merits in October 1975 and the balance of the appeal dismissed at the same time, Slip Op. No. 40, _____ F.2d _____, (2d Cir., Oct. 3, 1975).

moot by the Court of Appeals. The mandamus was denied from the Bench on April 1. Starting April 7 plaintiff moved for reargument of the denial of summary judgment against the Bank on count 4, made a new motion for partial summary judgment against the Bank and DASA on Count 4 on alleged new grounds.⁽¹³⁾ Plaintiffs also moved to add new parties and assert a new claim, and demanded a 105 day adjournment in the trial to prepare on the new claim. Upon it being revealed that the plaintiffs had submitted a misleading instrument to the Court, the new motion for partial summary judgment and the motion for leave to add new parties and claims were denied as well from the Bench on April 25.

The new motion against DASA for partial summary judgment also asserted the claim that a proposal to reduce the conversion price of a debenture constituted a "sale" under Sec. 5 of the Securities and Exchange Act of 1933 requiring registration. This claim was nowhere pleaded and was barred by the statute of limitations.

(13)

The alleged new grounds consisted of the claim of and allegedly illegal indemnity based upon the truncated letter (see p. 5, supra).

In addition, as I concluded in an opinion filed on April 14, it was without merit.

Thereafter, the plaintiff decided to serve five of those named as individual defendants to commence the action against them. When the first of said defendants moved for a dismissal for failure to prosecute, plaintiffs argued in opposition that the defendant had ". . . no obligation to participate as a defendant in the trial if it is held on May 12, 1975 (as presently scheduled) or at any time in the near future. He would not be bound by the results of the trial. . . ." I granted the motion to dismiss the five newly served individual defendants for failure to prosecute. Thereafter, the plaintiffs served a blunderbuss subpoena upon Arthur Andersen, which I quashed upon argument with leave to renew upon the trial upon a showing of specific items deemed necessary. Such subsequent leave was never sought.

Plaintiffs also moved to reargue the denial of the summary judgment against the Bank. This motion to reargue was made notwithstanding the fact that the plaintiffs had acknowledged upon the argument that their theory of liability against the Bank was without support in the

(14) law. It was denied. Plaintiffs also served a number of notices to depose Bank officers. These were stayed pending plaintiffs undertaking to the Bank, and were not thereafter pressed.

(see Civil Docket entries, Appendix A hereto),
There is more, but the foregoing, I believe, demonstrates the making of "unnecessary, groundless, vexatious and oppressive petitions and motions" which various courts have held constitute appropriate reason for the exercise of the court's equitable power to award attorneys' fees against an offending party. In Allard v. Consumer Credit Corp., 476 F.2d 951 (2d Cir. 1973), the defendant credit company had, with no apparent justification in law or fact, defaulted on certain promissory notes, and thereafter compelled protracted litigation. The court found that

Appellee's course of conduct in this action manifests an intention to use our already overcrowded court dockets and the time-consuming judicial process

(14) See p.5-6, supra. Plaintiffs contend that it is such efforts as it has made which "advance" the law. I find, however, a substantial difference between a party urging an arguably novel point and a party urging one which is not only without merit but, after denial, is again urged upon the Court by a motion to reargue.

(15) Local 149 U.A.W. v. Amer.Brake Shoe Co., 298 F.2d 212, 214 (4th Cir.) cert. denied, 369 U.S. 873 (1962).

as means to securing financial advantage. Such conduct bespeaks a willingness, therefore, to abuse the process of the federal court system. This alone might well provide adequate grounds for awarding reasonable attorney's fees to one in appellant's position. Id. at 958. (16)

This court is to be used as a forum for the resolution of disputes between parties. It may not be used as a weapon, as it has been here. (17)

Therefore, conclude that DASA Corporation and the Bank of New York should be reimbursed for attorneys' fees occasioned by the improper conduct of plaintiffs in this action.

DASA and the Bank of New York are, therefore, to submit to me within 45 days in affidavit form an appropriate statement of services rendered, to which plaintiffs may respond, so

(16)

See also, Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), where the Court found the imposition of a defense, twice pleaded, that a law was unconstitutional, after the Court had found it to be constitutional in another case, as well as a denial of discrimination which defendants could not and did not undertake to support on trial, to constitute the imposition of "defenses so patently frivolous that a denial of counsel fees to the petitioner would be manifestly inequitable." Id. at 402 n.5.

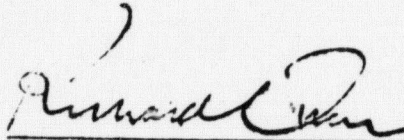
(17)

Especially disturbing is the fact that Bradley R. Brewer, the attorney for plaintiffs who prosecuted this action throughout, is also a party, owning \$52,000 of DASA's debentures. This was no ordinary party using the court as a negotiating tool, but one with training in the law, making the court processes more readily available to him for his purposes as a party.

that I may reach a suitable conclusion on this issue.

Given all the foregoing, the 3rd cause of action is dismissed. The determination as to attorneys' fees shall await the requested submissions.

The foregoing is so ordered. Submit judgment on notice.


United States District Judge

January 8, 1976.

DATE

PROCEEDINGS

1-23-72 FILED COMPLAINT. ISSUED SUMMONS.
 1-25-72 FILED ORDER TO SHOW CAUSE RE: P.P. D.A. and other cases. 1/25/72.
 1-25-72 Filed stipulation adjourning motion now ret. 1/25/72 to 1/27/72.
 1-26-72 Filed First Amended Complaint - Class Action.
 1-28-72 Filed Memorandum Endorsed on Unsigned Order. The Court has been advised that an amended complaint has been served and that this application has become moot and is withdrawn. McLean J. (mailed notice)
 May 4-72 Filed Order. Ordered that dft. DASA Corp's time to answer to complaint to 5/22/72. Motley J.
 May 5-72 Filed Memorandum of Law.
 May 8-72 Filed Affidavit of Richard B. Persinger in support of DASA's application for prom: consideration, etc.
 May 11-72 Filed (in court) Memorandum of Law.
 May 10-72 Filed Memorandum in opposition to pliffs' motion for temporary injunction.
 May 11-72 Filed Memorandum of Law.
 May 13-72 Filed Memorandum in support of dft. DASA Corp.'s application for determination of plaintiffs' motion for pre.inj.
 May 13-72 Filed OPINION #38475. Motley, J. The court finds that plaintiffs have shown none of the prerequisites for a preliminary injunction and therefore denies the motion. (mailed notice).
 May 19-72 Filed ANSWER of dft. The Bank of New York to the First Amended Complaint.
 May 12-72 Filed Stip & Order extending time for dft. Arthur Andersen & Co., to answer to complaint to 5/22/72. So Ordered Lasker J.
 MAY 13-72 Filed summons with marshal's return. Served Dasa Corporation by Dan F. Murphy on 4/6/72.
 Also served The Bank of New York c/o Olin, Murphy, Manuel & Lynch Esqs. by Peter Esquerre on 4/11/72.
 " " Arthur Andersen & Co. by Marjorie Feebles on 4/18/72.
 May 22-72 Filed Dft. DASA Corp., ANSWER.
 May 24-72 Filed Dft. Arthur Andersen & Co., ANSWER.
 May 25-72 Filed Notice of Appeal. (mailed notice)
 May 19-72 Filed Order to Show Cause re: Class Action. Ret. 6/6/72. (by pltf.)
 Jun 1-72 Filed Memorandum of dft. the Bank of N.Y. in opposition to pliffs' motion for a determination that this action be maintained as a class action.
 Jun 2-72 Filed Memorandum of Law in opposition to pliffs' motion for determination of class action.
 Jun 6-72 Filed Memorandum of Law by Pliffs.
 Jun 10-72 Filed Affidavit in opposition by Richard A. Reichter.
 Jun 12-72 Filed Pliffs. Memorandum of Law.
 Jun 15-72 Filed Undertaking for costs on appeal Bond No. 2403857. in the amt. of \$250. by National Surety Corp.
 Jun 27-72 Filed Certified Record on Appeal to the U.S.C.A.
 Aug 28-72 Filed Pliffs Interroga directed to Dasa Corp.
 Sept 1-72 Filed stip adjourning Motion for Class Action ret 9/5/72 to Sept 10/3/72.
 Sep. 25-72 Filed affdvt & notice of motion to vacate interrogatories. ret: 10-3-72 for Dft
 Sep. 25-72 Filed dfts memorandum of law in support of motion. for dft DASA
 Sep 26-72 ~~Filed Stipulation that the action be maintained as a class action motion is adjourned to 10-3-72.~~
 Oct 17-72 Filed True copy of USCA. Order that the Appeal is dismissed for lack of prosecuti
 Fusaro, Clerk.
 Dec 5-72 Filed dft DASA Corp. answers to pliffs Interrogatories.
 Dec 5-72 Filed dft dsa corp. objections to pliffs interrogatories

PROCEEDINGS

Date
Judge

- 16-73 Filed memo endorsed on Order to Show Cause of 5/19/72. Following review of papers
Filed to date on this motion and following hearings with counsel, I am deferring
final determination of whether this is or is not a proper class action until
further discovery proceedings have been completed and further pre-trial hearings
have been held to narrow or eliminate issues. So Ordered Griesa J. m/n
- 19-73 Filed deft. Bank of N.Y. notice of motion. Re; Undertaking for costs, ret before
Griesa J. on 2/5/73.
- 19-73 Filed deft Bank of New York's memo in support of its motion.
- 23 Filed Pltffs affidavit in opposition by Bradley R. Brewer.
- 23 Filed memo endorsed on motion papers filed dtd 1/29/73. Motion denied without pre-
judice to renewal at a later stage after further discovery has been completed.
So Ordered Griesa J. m/n
- Feb 25-73 Filed Pltffs notice of motion, Re: Partial Summary Judgment, ret. before Griesa J.
on 3/5/73
- 25-73 Filed Pltffs memo of law in support of its motion.
- 3-73 Filed stip & order that pltffs motion for an order granting partial summary judgment
is adjourned until 3/29/73. So Ordered Griesa J.
- 21-73 Filed deft's notice of motion, Re: Summary Judgment, ret before Griesa J. on 3/29/73
- 21-73 Filed Deft's Dasa Corp's memo in support of its motion for summary judgment
- 4-73 Filed Stip and Order that the pltffs' motion for an order, per to
Rule 56(a) FRCP granting partial summary judgment to pltffs
is adj'd to 4-27-73 etc. GRIESA, J.
- 4-73 Filed Pltff's Statement pursuant to rule 9(g).
- 4-73 Filed deft. Dasa Corp's response to pltffs rule 9(g) statment.
- 4-73 Filed deft. Dasa Corp's reply memo of law.
- 1-73 Filed Pltff's memo of law, in opposition to deft. Dasa Corp's motion for summary
Judgment.
- 4-73 Filed Affidvt of James D. Zirin in opposition to pltffs' motion for
parrial summary judgment on claims 1 & 2.
- 3 Filed Stip and Order that the pltff's motion for order to Rule 56(a)
& (d) FRCP granting parrial summary judgment to pltffs is adj'd
to 5-4-73, etc. GRIESA J.
- 4-73 Filed stip and order that the deft. Bank of N.Y. has no relief sought against it
under claims 1-2 of the first amended complaint, also they are not required
to file a 9(g) statment. So Ordered Griesa J.
- 8-13-73 Filed pltffs' request for admission of facts, No. 1.
- 8-11-73 Filed stip and order extendint time for DASA to respond to pltf. request
for admission until Sep. 25-73. GRIESA, J.
- 1-73 Filed memorandum that pltffs' motion for partial summary judgment and other
relief under F.R.C.P. 56 with respect to claims 1 and 2 is denied; motions
of defts. DASA and Arthur Andersen & Co. for summary judgment on claims 1 and
2 are granted and said claims are dismissed. So ordered-Griesa, J.-mailed notice
- 27-73 Filed deft's (DASA) statement in response to request for admission of facts.
- 23-73 Filed pltffs' notice of appeal from order filed 10-1-73-mailed notice to
Jacobs Persinger & Parker; Sullivan & Cromwell; Breed Abbott & Morgan.
- 12-74 Mailed notice of reassignment.
- 3/74 Pre-trial hearing *Cum*
- 73-74 Filed Pltffs. Memorandum Re: Status of the action; (2) Pltffs. Class Action Motion;
(3) Proposed next steps in this action.
- 74 Filed Pltffs. Notice of Motion. Ret. 3/29/74. Re: Final Judgment.
- 74 Filed Deft. Dasa Corp. Memorandum of Law to pltffs. motion requesting reargument.
- 74 Filed Deft. Dasa Corp. Memorandum of Law to pltffs. class action motion.

DATE	PROCEEDINGS	Dr Jud
11.74	Filed Memorandum of the Bank of N.Y. pursuant to this court's direction.	
13.74	Filed Deft. Bank of N.Y. Notice of renewal & Affidavit. Rec. 4/5/74.	
16.74	Filed Opinion #40970 Pltffs. motion for reconsideration of decision of Judge Griesa is denied. I grant pltffs. motion to certify the order of 9/27/73 of Judge Greisa as a final order pursuant to that rule. However I deny pltffs. motion authorizing an interlocutory appeal. I deny pltffs. motion for a Class action status. Pltffs. motion to represent the stockholders is denied as moot. The motion of the Bank of New is denied in my discretion. The Courts determination on each of the foregoing motions is so ordered. Owen J. (mailed notice)	
ul 17.74	Filed Amended Notice of Motion & supporting affidavit. Re: Depositions. ret. 8/23/74. (by Pltffs.)	
ul 17.74	Filed Pltffs. proposed findings of fact with respect to claim 3.	
18.74	Filed Pltffs. Rebuttal Memorandum.	
21 26.74	Filed Memorandum of Deft. Dasa Corp. in opposition to pltffs. motion for an order directing that depositions be taken through the use of tape recording & for a pre trial Order.	
2/74	<i>P.T.C. Hrs</i>	
16-74	Filed order of dismissal with permission to the plttf. to move to vacate dismissal within 30 days--Owen, J. ---Mailed notices.	
9-74	Filed plttf's affdvt & notice of motion to vacate dismissal-Ret. 10-11-74.	
9-74	Filed deft's (DASA) memorandum in opposition to motion to vacate.	
11.74	Filed Memo. End. on motion dtd 7/17/74. Motion is denied. Owen J. (mailed notice)	
11.74	Filed Memo. End on motion dtd 10/11/74. In accordance with my order of 9/12/74, the order of dismissal & return the action to its previous position before me. In so doing I expressly reject certain statements made in the sz supporting papers herein. So Ordered Owen J.	
15.74	Filed Judgment dismissing the complaint as to Claims 1 & 2 on the merits. Owen J. (mailed notice)	
18.74	Filed Pltffs. Notice of Appeal from the Judgment dtd. 10/15/74. (mailed notice)	
19-74	Filed Memo of law of deft. Arthur Andersen Co. in opposition to pltffs. motion.	
19-74	Filed notice that the Memorandum record on appeal has been certified and transmitted to the U.S.C.A. this date.	
14-75	Filed deft's (Dasa) bond undertaking for costs on appeal-\$250. Fireman's Fund.	
22-75	Filed true copy of U.S.C.A. stip dismissing appeal as to Bk. of N.Y.	
10-75	Filed pltffs' Statement pursuant to Rule 9(g) & notice of motion for partial summary judgment. Ret. 3-23-75	
10-75	Filed pltffs' memorandum of law in support of motion for partial summary judgment as to liability on claim 3.	
17-75	Filed pltffs' 9(g) statement & notice of motion for summary judgment.-Ret.3-23-75.	
17-75	Filed pltffs' memorandum of law. in support of motion for summary judgment.	
17.75	Filed Memorandum of the Bank of N.Y. in response to pltffs. motion for partial summary judgment allegedly as to claim 3.	
18.75	Filed Pltffs. Memorandum of Law.	
25-75	Filed deft's (Dasa) memorandum in opposition to pltffs' motion for partial summary judgment.	
25-75	Filed deft's (Arthur Andersen & Co) memorandum for partial summary judgment as to claim 3.	
27-75	Filed pltffs' memorandum of law in reply to Dasa's memorandum.	
2-75	Filed deft's (Bk. of N.Y.) notice of renewal of motion requiring plttf. to file an undertaking-All answering papers are to be filed by 4-7-75.	

Apr. 7-75 Filed plffs' affidavit in opposition to motion for untaking. & in support of application for reconsideration & reversal of ruling 3-29-75.

pr. 7-75 Filed plffs' affidavit in opposition to motion to dismiss by A. Andersen.

pr. 7-75 Filed plffs' request to produce.

pr. 7-75 Filed plffs' memorandum in opposition to motion to dismiss by A. Andersen.

pr. 7-75 Filed plffs' notice to take depositions.

pr. 10-75 Filed deft's (Andersen) reply affidavit in support of motion to dismiss.

pr. 10-75 Filed deft's (Andersen) reply memorandum in support of motion to dismiss.

pr. 11-75 Filed defts' (Bk. of N.Y.) affidavit & notice of motion for a Protective Order-Ret. 4-25-75.

pr. 11-75 Filed deft's (Bk. of N.Y.) memorandum in support of motion for a Protective Order.

Apr. 16-75 Filed MEMORANDUM OPINION #42,254--Plffs. motion for partial summary judgment as to Liability on claims 3 & 4 are denied. Trial set for May 5, 1975. I defer passing upon defts' application for counsel fees on the motions until the conclusion of the trial. Leave should be granted to deft. Bk of N.Y. to renew its motion for security for costs which I earlier denied. So Ordered--Owen, J. Mailed Notices.

pr. 21-75 Filed Opinion #42276- The Bank of N.Y. is entitled to an undertaking by plffs for its costs & attys fees herein pursuant to the Trust Indenture Act. Plffs are directed to procure such an undertaking in the amount of \$25,000 running to the Bank, which shall be filed no later than 4/25/75. All proceedings against the Bank are STAYED until the filing thereof. Owen J. (mailed notice)

pr. 21-75 Filed Opinion #42277- Deft: Andersen's motion to dismiss the complaint as to all pending claims asserted against it is granted. Owen J. (mailed notice)

pr. 22-75 Filed Memorandum of Law in support of plffs. motion ret. 4/25/74.

pr. 18-75 Filed plff's notice to take deposition

pr. 23-75 Filed memo endorsed on Order to Show Cause--filed error.

pr. 23-75 Filed plffs' affidavit & unsigned order to show cause. ((Rule 37))

pr. 23-75 Filed memo endorsed on unsigned order to show cause filed this date--I decline to sign this order to show cause involving discovery of the Bk. of N.Y.--Owen, J.

pr. 23-75 Filed plffs' affidavit & unsigned order to show cause. (Rule 37)

pr. 23-75 Filed memo endorsed on unsigned order to show cause filed this date--I decline to sign this order to show cause. I have this day, in a memorandum & order dismissed the complaint as against deft. Arthur Andersen & Co --Owen, J.

pr. 23-75 Filed memo endorsed on motion filed 4-11-75--Decision in accordance with my memorandum & order dated 4-18-75 concerning deft. Bk. of N.Y.--Owen, J.

pr. 23-75 Filed supplemental order #42,276. deleting par. 9 & substituting as indicated.--So Ordered--Owen, J. Mailed

pr. 23-75 Filed memorandum of the Bk. of N.Y. in opposition to plff's motion for summary judgment.

pr. 23-75 Filed deft's (DASA) affidavit in opposition to plffs' motion for summary judgment.

pr. 23-75 Filed deft's (DASA) memorandum in opposition to plffs' motion for partial summary judgment.

pr. 29-75 Filed plffs' affidavit & notice of motion Re: to reverse decision on undertaking Ret. 5-2-75.

pr. 29-75 Filed memo endorsed on motion filed this date--Motion denied.--So Ordered--Owen, J. Mailed notices.

pr. 30-75 Filed defts' (Dasa et ano) affidavit & Order to Show Cause to dismiss. Rule 41(b) Ret. 4-30-75.--Owen, J.

pr. 30-75 Filed defts' (Dasa et ano) memorandum in support of motion to dismiss.

pr. 2-75 Filed plffs' memorandum in support of motion to transfer action to another judge.

pr. 2-75 Filed summons & return, served Ernest T. Graeff on 4-28-75.

pr. 6-75 Filed memo endorsed on Order to Show Cause filed 4-30-75. The within motion of deft. Ernest T. Graeff is granted and the complaint is dismissed as to him pursuant to FRCP 41(b). So Ordered--Owen, J. Mailed notices.

-Cont'd Page #6-

May 6-75 Filed Defts' (Dasa et al) affidavit & notice of motion to dismiss against Robt LeBuhn-Ret. date to be set.

May 7-75 Filed affidavit of (Andersen) & Show Cause Order to quash subpoenas-Ret. 5-9-75-Owen

May 7-75 Filed deft's (Dasa) affidavit in opposition to plttf's motion to quash subpoena.

May 7-75 Filed plttfs' memorandum in opposition to (Dasa) motion to dismiss. against deft. Ernest T. Greeff.

May 7-75 Filed summons & return, served Robert LeBuhn 5-5-75.

May 9-75 Filed defts' (Dasa et al) memorandum in support of motion to dismiss action against Ernest T. Greeff.

May 9-75 Filed plttfs' affidavit in opposition to motion to dismiss as against Ernest T. Greeff

May 12-75 Filed memorandum of Arthur Andersen & Co. in support of motion to quash subpoenas.

May 12-75 Filed plttfs' affidavit in opposition to deft's motion for an order to quash subpoena

May 12-75 Filed plttfs' memorandum of law in support of plttfs' motion to quash subpoena.

May 12-75 Filed plttfs' memorandum of law in opposition to deft's motion to quash subpoena.

May 12-75 Filed memo endorsed on Order to Show Cause filed 5-7-75. Re: quash subpoenas-- This motion is granted in accordance with the minutes of May 9, 1975. So Ordered Owen, J.-Mailed notices.

May 12-75 Filed memo endorsed on motion filed this date to quash subpoena.-Motion is granted as stipulated by counsel. Said stip. is embodied in the minutes of May 9, 1975 So Ordered-Owen, J. Mailed notices.

May 12-75 Filed plttf's atty. affidavit & notice of motion to quash subpoena.-Ret. 1st day of trial. (see above entry)

May 12-75 Filed Judgment dismissing action as to the Bank of N.Y. (the Bank), on the merits, with prejudice and with costs. The Bank shall have leave to make an application for an award of reasonable attys' fees--Owen, J. Mailed notices. Judgment Ent. 5/13/75 Clerk, Ent. 5/13/75.

May 13-75 Filed summons & return, served deft. Edgar B. Stern 5-6-75 in District 13.

May 16-75 Filed defts' (Dasa) affidavit & notice of motion to dismiss.-Ret. date to be set.

May 22-75 Filed plttf's notice of appeal from order dtd. 4-23-75 dismissing the complaint as to deft. Arthur Andersen & Co, order dtd. 5-6-75 dismissing complaint as to deft. Ernest T. Greeff, order dtd. 5-12-75 quashing trial subpoenas served on deft. Arthur Andersen & Co filed 5-12-75 and from the judgment dismissing the complaint as to deft. The Bank of New York filed 5-12-75 & entered 5-13-75. Mailed copies to Jacobs, Persinger & Park--Sullivan & Cromwell and to Breed Abbott & Morgan.

May 25-75 Filed deft's Dasa Corp. & Ronald W. Bolivar Affidavit & Notice of Motion for an Order to dismiss. Ret. Sine Die.

May 25-75 Filed Summons & Marshalls Ret. Served: John Deneen on 5-22-75

May 30-75 Filed Defts. Dasa Corp. & Richard A. Reichter affidavit and notice of motion for an order dismissing this action, Ret. Sine Die.

June 5-75 Filed deft's (Bolivar) affidavit & notice of motion to dismiss-Ret. date to be fixed.

June 5-75 Filed memo endorsed on motion filed this date-Motion granted in accordance with the minutes of June 2, 1975-So Ordered--Owen, J. Mailed notices.

June 5-75 Filed memo endorsed on motion filed 5-15-75-Motion granted in accordance with the minutes of June 2, 1975-So Ordered--Owen, J. Mailed notices.

June 5-75 Filed memo endorsed on motion filed 5-30-75-Motion granted in accordance with the minutes of June 2, 1975-So Ordered--Owen, J. Mailed notices.

June 4-75 Filed summons & return, served deft. Richard A. Reichter 5-23-75 Dist. 38.

June 4-75 Filed summons & return, served deft. Ronald W. Bolivar 5-27-75 Dist. 38.

June 6-75 Before Owen, J.--Non-Jury Trial Begun.

June 8-75 Trial Cont'd.

June 4-75 " "

June 5-75 " "

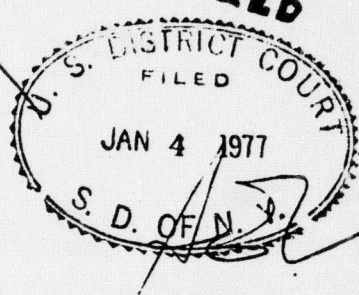
June 6-75 " "

June 9-75 " " and concluded. Decision Reserved.



Lix Ba

ENTERED



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
BROWNING DEBENTURE HOLDERS'
COMMITTEE, et al.,

Plaintiffs,

72 Civ. 1332

-against-

DASA CORPORATION, et al.,

: MEMORANDUM AND ORDER

Defendants.
----- x

OWEN, District Judge

For the reasons set forth in my opinion of January 8, 1976, defendants were awarded counsel fees. A hearing was set for determination of the amount of fees due. DASA Corporation, The Bank of New York, and Arthur Andersen & Co. applied for fees and disbursements, and each presented documentation and oral testimony in support of their application. At the hearing attorney Bradley Brewer represented himself and plaintiff Roy E. Brewer; plaintiff Sims Browning was represented by separate counsel.*

* Prior to the hearing plaintiff Browning made a settlement with DASA and the Bank, leaving open only the question of amount due to Andersen.

JAN 04 1977

MICROFILM

JAN 04 1977

1377

Appendix D

Preliminarily, upon consideration of the entire matter, I conclude that it is appropriate to restrict any award to one for those services performed in connection with matters that were before the District Court and particularly those where I personally observed the conduct giving rise to the propriety of any award. Given this, I turn to the respective applications for fees.

DASA Corporation seeks attorneys' fees and disbursements for services commencing in 1972 through the post-trial submission of findings and conclusions in 1975. This case was reassigned to me in early 1974. Thereafter, in the months before and up to the eve of trial, I ruled upon the numerous motions which are described in detail in my opinion of January 8, 1976.

I presided over the six-day trial herein. Based upon personal observation and the time records of Jacobs Persinger & Parker applicable to those matters before me, and given the quality of counsel appearing in the courtroom, I conclude that \$40,000 is a fair and reasonable fee for DASA's pretrial motion work, pretrial preparation, the trial itself and the preparation of proposed findings and conclusions.

As to the application of The Bank of New York, not only did the Bank have to deal with plaintiffs' motions

as to all defendants made in the months before the trial to protect its client's interests, but almost on the eve of trial, the Bank had to directly engage in motion practice by reason of a motion for partial summary judgment and numerous notices of depositions served upon it having no apparent basis other than to compel a trial adjournment (see footnote 8 of my opinion of January 8, 1976). From a personal awareness of the foregoing and a study of the time sheets of the firm of Sullivan & Cromwell applicable to these matters, I conclude that The Bank of New York is entitled to reasonable attorneys' fees in the amount of \$7,000.

Arthur Andersen & Co. was the subject of utterly meritless causes of action alleging no basis for damages, which upon motion were dismissed in an opinion dated April 18, 1975. Along the way, Andersen's counsel, too, was required to spend time protecting its client's interests in the face of plaintiffs' numerous motions. Even following dismissal, plaintiffs continued to treat Andersen as a party and forced motion practice upon it. From my awareness of counsel's appearances in Court on these matters and a study of the time sheets of Breed, Abbott & Morgan applicable thereto, I observe that approximately the same efforts were required on behalf of Andersen's counsel as were required on behalf of the Bank's counsel, and I award as a reasonable

fee the sum of \$7,000.

The requests for disbursements under the rubric of "counsel fees" are, in the exercise of discretion, denied. This ruling does not, however, preclude any appropriate taxing of costs in connection with the entry of final judgment herein.

I have further been requested by Sims Browning to apportion the responsibility as to each plaintiff for any counsel fees awarded on the basis of some definable individual responsibility. Having considered the various submissions by counsel on this subject, I decline in the exercise of discretion to do so on this record.

The foregoing is so ordered. The parties may submit an appropriate judgment on notice.

January 3, 1977



United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

US DISTRICT COURT
FILED
JANUARY 14 1977
SD of NY

-----x
BROWNING DEBENTURE HOLDERS' : 72 Civ. 1332 (R.O.)
COMMITTEE, et al., :
Plaintiffs, :
-against- : JUDGMENT
DASA CORPORATION, et al., : F77 83
Defendants. :
-----x

Defendant Arthur Andersen & Co. having moved for an order pursuant to Rules 11, 12(b)(6) and 23.1 F.R.Civ.P. dismissing this action as to it, and the Court having granted the said motion by an order dated April 18, 1975; and

Defendant Ernest T. Greeff having moved by order to show cause for an order pursuant to Rule 41(b) F.R.Civ.P. dismissing this action as to him, and the Court having granted the said motion by an order dated May 2, 1975; and

Defendants Edgar B. Stern, Robert LeBuhn, Richard A. Reichter and Ronald W. Bolivar having moved for orders pursuant to Rule 41(b) F.R.Civ.P. dismissing the action as to them, and the Court having granted the said motions by orders dated June 4, 1975; and

A judgment having been entered on May 13, 1975 dismissing the action on the merits as to defendant The Bank of New York and granting said defendant leave to make an application to this Court for the award of reasonable attorneys' fees; and

Defendant DASA Corporation having moved for an order granting it leave to make an application for an award of reasonable attorneys' fees and expenses, and the Court having granted said motion by a decision dated January 8, 1976; and

Defendant Arthur Andersen & Co. having moved for an order granting it leave to make an application for an award of reasonable attorneys' fees and expenses, and the Court having granted said motion by an order dated July 21, 1976; and

The action having come on to trial as to Claim 3 of First Amended Complaint before the Court, Honorable Richard Owen, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered; and

An evidentiary hearing on the respective applications for awards of attorneys' fees and expenses having been held before the Court, Honorable Richard Owen, District Judge, presiding, and a determination of the respective amounts thereof having been duly made; it is hereby

ORDERED, ADJUDGED AND DECREED that Claims 3, 4 and 5 of the First Amended Complaint in the action be dismissed as to all defendants, with prejudice; and further

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendant DASA Corporation against plaintiffs Roy E. Brewer and Bradley R. Brewer, jointly and severally, in the amount of \$40,000.00, as an award of reasonable attorneys' fees, with interest thereon at the rate of 6% per annum from the date of entry hereof, as provided by law; and further

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendant The Bank of New York against plaintiffs Roy E. Brewer and Bradley R. Brewer, jointly and severally, in the amount of \$7,000.00, as an award of reasonable attorneys' fees, with interest thereon at the rate of 6% per annum from the date of entry hereof, as provided by law; and further

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendant Arthur Andersen & Co. against plaintiffs Simms C. Browning, Roy E. Brewer and Bradley R. Brewer, jointly and severally, in the amount of \$7,000.00, as an award of reasonable attorneys' fees, with interest thereon at the rate of 6% per annum from the date of entry hereof as provided by law.

Dated: New York, New York

JANUARY 11, 1977

Richard Owen
Richard Owen
United States District Judge

JUDGMENT ENTERED - 1/17/77
Raymond Burghardt
clerk

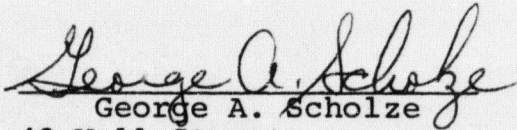
CERTIFICATE OF SERVICE

Service of a copy of the annexed brief was made upon the following counsel for the parties herein by placing same in the United States mail, postage prepaid, this 28th day of March, 1977.

Brewer & Soeiro, Esqs.
Attorneys for Plaintiffs
257 Park Avenue South
New York, N.Y. 10010

Breed, Abbott & Morgan
Attorneys for Arthur Andersen & Co.
One Chase Manhattan Plaza
New York, N.Y. 10005

Jacobs Persinger & Parker
Attorneys for DASA Corporation
70 Pine Street
New York, N.Y. 10005


George A. Scholze
48 Wall Street
New York, N.Y. 10005
(212) 952-8100

